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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1295

DAVID H. WENGER,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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OCTOBER TERM, 1971

**Docket No.**

DAVID H. WENGER,

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner David H. Wenger prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on January 26, 1972.

## Opinion Below

The opinion of the Court of Appeals, reprinted in an Appendix bound with this petition, is not yet officially reported.

## Jurisdiction

The judgment of the Court of Appeals was entered on January 26, 1972. A timely petition for rehearing and a hearing en banc was denied March 10, 1972. Jurisdiction in this Court is invoked under 28 U.S.C. §1254(1).

## Questions Presented

1. Does a deliberate and unexcused delay in prosecution, under circumstances arranged by the prosecution which prevented demand for a speedy trial, result in a denial of the Fifth and Sixth Amendments guarantees of due process and a speedy trial?

2. Did the deliberate prosecutorial reliance on hearsay testimony of a non-witness investigating agent before a grand jury when direct witnesses were available deny petitioner due process and the right to be held to answer only on an indictment found by a grand jury?

3. Did the jury's demonstrated inability to disregard hearsay testimony as to a co-defendant's damaging statement, never admitted against petitioner, and later ruled out of the case for all purposes, deny petitioner due process, a fair trial and the right to confront witnesses?

4. Can a conviction for tax evasion be had for a single year on a single transaction reported on petitioner's return in a manner calling it to any Internal Revenue Agent's attention, the only dispute being whether it should have been reported on one page rather than another of the questioned return?*

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* Should certiorari be granted, petitioner wishes to reserve the right to argue an additional question: whether acquittal of petitioner on the conspiracy required acquittal on the substantive count since the prosecution's claim was the same as to both.

## Constitutional Provisions Involved

The provisions of the Fifth and Sixth Amendments to the United States Constitution are reprinted at the end of the Appendix bound with this petition.

## Statement of the Case

Petitioner, David H. Wenger, was found guilty by a jury, after two days of deliberation, on the first count of indictment 70 Cr. 190, alleging an attempt to evade a part of his 1963 federal income tax in violation of 26 U.S.C. §7201 (A. 5-6, 564, 584).* He was sentenced thereon to three years probation and a fine of $7500. by the Hon. Jack B. Weinstein United States District Judge for the Eastern District of New York (A. 674).

Petitioner was granted judgment of acquittal, near the close of the prosecution's case, on the second count of the indictment which alleged he conspired with co-defendant Melvin Semel to commit the crime alleged in the first count (A. 6-7, 400). At the same time, the prosecution dismissed the second count against the co-defendant Semel who was named only in that count (Ibid.).

### 1. Deliberate Prosecutorial Delay.

The trial below was had in December of 1970 on indictment 70 Cr. 190, which was filed on March 31, 1970 (A. 1, 2), almost six years to the day after petitioner's 1963 federal income tax return was filed.

It was discovered at trial, as material was produced under 18 U.S.C. §3500, that the Internal Revenue Service

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* References in the form "A—" are to petitioner's appendix on appeal filed in the Court below.

investigation of the case commenced May 31, 1966 (A. 602) and was completely early in 1968, the Special Agent's final report being completed thereafter in July, 1968. (Ibid.) Later in July, 1968, the case was presented to a grand jury in the Eastern District of New York through the testimony of direct witnesses (A. 600-01). No indictment was returned by that grand jury and, on the argument of the motion to dismiss the indictment for deliberate delay in prosecution, the prosecutor stated that grand jury was not requested to return an indictment (A. 365). The 1968 grand jury proceeding herein developed no facts or issues not already encompassed by the Special Agent's investigation and report (A. 602-03). No investigation was made thereafter. The indictment was not returned until two years thereafter by another grand jury before which the Special Agent, who was the sole witness, merely testified as to a summary of his report (A. 365-6, 603).

Meanwhile, at least six indictments were returned against Mr. Wenger in the Southern District of New York (68 Cr. 434, 68 Cr. 467, 68 Cr. 477, 68 Cr. 614, 69 Cr. 569, 70 Cr. 213) on two of which Mr. Wenger was subjected to lengthy trials in 1970 just prior to his trial below (A. 613). The first trial of the Southern District indictments against Mr. Wenger commenced on April 8, 1970, a schedule set by that court prior to the return of the indictment herein. Judge Weinstein assured the prosecutor below that had an indictment been returned in this case in 1968, it would have been tried long before the Southern District cases (A. 370-1). The deliberate prosecutorial delay of two years prevented petitioner from even demanding this right let alone obtaining its assured guarantee.

All of the Southern District indictments against Mr. Wenger involved extensive publicity and left him in no position to defend himself effectively at the trial below (A. 613-14).

All witnesses were available in 1968. This was not so in 1970. The antique dealer through whom the sole transaction complained of was arranged, Roger van der Straeten, had no recollection of the crucial dates as to when the transaction was arranged (A. 200-01). John Handy, who carried out that transaction, had so deteriorated through age (82) injury or a combination thereof, in a manner which the cold transcript cannot fully demonstrate (T. 737-9, 758)* as to become effectively unavailable as

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* References in the form "T—" are to the portions of the trial transcript not reproduced in the appendix filed below. The prosecutor described John Handy's condition: "Your Honor, as I said to the Court, Mr. Handy is 82. We knew the problem. We sent someone—first thing in the morning.

He walks with a walker. He had a fractured hip a few years back.

There might be some problems getting him in and out of a car." (T. 739) When an attempt was made to question John Handy on voir dire the following occurred:

> "The Clerk: Do you solemnly swear—
> Mr. Handy: I can't hear a word you are saying" (T. 758)
>
> * * *
>
> "Q. Mr. Handy, did Mr. Semel tell you that Mr. Wenger wanted a capital gain?
>
> The Court: Excuse me. I want you to think of this very carefully because this is vital to the case. I don't want you guessing. Is that clear?
> The Witness: What did he say?
> Mr. Wilson: The judge instructed you to think about your answer very carefully and make sure your answer is based upon what you know.
> The Witness: I have hearing trouble and this aid has gone bad (indicating.)" (T. 764)

a witness and in fact was not called in the presence of the jury.

The trial court's reluctant denial of petitioner's motion to dismiss the indictment because of the prosecution's deliberate, oppressive and prejudicial delay (A. 667) was affirmed by the Second Circuit with the one sentence statement, —— F. 2d ——, (2d Cir. Docket No. 71-1728, slip sheet op., p. 1563): "The indictment was returned within the statute of limitations and no prejudice resulted from the preindictment delay. United States v. Marion, 40 U.S.L.W., 4092, 4096 (December 20, 1971)."

**2. Subversion of the Grand Jury Process.**

As already noted only Special Agent Silverman appeared before the 1970 grand jury which returned the indictment against petitioner. He was not a witness to the purchase and sale of the antiques on which the additional tax asserted was predicated nor to any other of the events germane to the case. All the prosecution witnesses who testified at the trial were available and most of them in fact were called before the 1968 grand jury which was not asked to, or in any event did not, indict (A. 365-6, 601).

Special Agent Silverman's 1970 grand jury testimony, which was solely hearsay, often thrice removed from the original declarant, and often contrary to the trial testimony of direct witnesses, as given, may very well have misled the grand jury into believing it was receiving direct testimony (A. 603-08).

The trial court (A. 667) and the Second Circuit (slip sheet op. 1563) upheld the indictment on the factual ground that there were present in the 1970 grand jury room documents relating to the antique transaction. It is not at all clear, however, that these documents were

made available to the grand jury. The documents were in themselves meaningless without the testimony (adduced at trial and before the 1968 grand jury) of the persons who prepared and used those documents to effectuate the antique transaction.

The legal basis upon which the Second Circuit upheld the indictment was a restatement of a rule first enunciated in *United States* v. *Liebowitz*, 420 F. 2d 39; 42 (2d Cir. 1969) that the burden is upon the defendant in a criminal case to prove that he is entitled to the Fifth Amendment guarantee of indictment by a grand jury:

> "Secondly, Wenger has failed to establish that:
>
> ". . . the grand jury . . . [was] misled into believing it . . . [was] getting eye-witness testimony from the agent . . . [or that there was] a high probability that with eye-witness rather than hearsay testimony the grand jury would not have indicted." (slip sheet op., p. 1563)

### 3. The Hearsay Tainted Conviction

The prosecution's theory of the case was that the gain on petitioner's sale of antiques he had purchased from John Handy (the sale was also arranged by John Handy) was a finder's fee on a loan from a union officers' pension fund to Handy's corporation.

Over objection of petitioner's counsel (A. 40), Edward Handy, John's son and an employee of the Handy corporation in 1963, testified that on September 6, 1963, the date of the closing of the loan, he received a telephone call from Semel (attorney for John Handy and his corporation) in which he was asked to come to Semel's office half an hour early (A. 39-40). When E. Handy went there, Semel, who was alone, allegedly told him "that the finder's

fee, for which I had a check in my pocket, was not to be paid by check (A. 41) . . . and alternatively was to be paid by making a sale of something, and he discussed with me antiques, and a—at a price that was reduced from the market value by the amount of the finder's fee" (A. 44). The trial court instructed the jury that Handy's testimony as to this conversation could only be used against Semel who was at that point a co-defendant (A. 41).

At the suggestion of the trial judge (A. 399-400), the prosecutor dismissed the conspiracy count, the only one in which Semel was a defendant, as to Semel, and called him as a prosecution witness. Just before he so testified, the court instructed the jury that nothing Semel was alleged to have said outside of the presence of petitioner "is any longer evidence in the case." (A. 401) Semel did not testify that he had any conversation with Edward Handy half an hour before the loan closing about a finder's fee, the antique transaction or anything else. The prosecutor did not even ask him about it.

The jury was unable to follow the trial court's instructions to disregard Edward Handy's hearsay testimony. During the second day of deliberations, the jury asked for the testimony where Semel requested E. Handy to come to the closing earlier than the others (A. 571, Ct. Ex. 11). The testimony was not read, yet the record is clear that shortly before the guilty verdict was returned, the jury had the damaging hearsay firmly in mind. The conclusion seems inescapable that it was used to convict petitioner either as direct evidence or to discredit Semel since he did not testify as to any such conversation.

The Court below held, "The hearsay problems which arose during the course of the trial were cured when the out-of-court declarant became a witness." (slip sheet op., p. 1562-3)

**4. The Failure of Proof.**

The sole attempt to evade alleged against petitioner was the reporting of the antique sale as a short term capital gain on Schedule D of his 1963 federal income tax return instead of on an earlier page as ordinary income. Concededly a short term capital gain is ordinary income and the antique sale, as such, was properly so reported (A. 469-70).

The Revenue Agent who audited Mr. Wenger's 1963 return, Hyman Heller, said he had no trouble finding the antique sale reported on Schedule D of that return (A. 296-7) and that, indeed, it stood right out from the other transactions:

> "Q. Mr. Heller, you have checked capital gains schedules on many returns, have you not?
>
> A. Yes.
>
> Q. And would you say that the indication of the Handy-Partride sale on line ten of the schedule D, of Mr. Wenger's personal income tax return is sufficiently distinctive from the other transactions to stand right out?
>
> A. Oh, yes." (A. 302)

In fact, Revenue Agent Heller received from petitioner the documentation on the reported antique sale (A. 296) and personally verified that the capital losses against which it was offset were correctly reported (A. 297).

Petitioner contended below that his conviction on a single transaction reported on his return in a manner calculated to bring it to the attention of the Internal Revenue Service as it did was contrary to the decisions of this Court in *Ingram* v. *United States*, 360 U. S. 672, 678-80 (1959) and *Spies* v. *United States*, 317 U. S. 492, 498, 499

(1943). The Court below merely held, "From the evidence presented on the trial, the Jury could easily have found established beyond a reasonable doubt all the elements necessary for conviction of the crime charged in count I of the indictment." (slip sheet op., p. 1562)

## REASONS FOR GRANTING THE WRIT

### 1. Dismissal of the indictment is the only effective redress for the violation of petitioner's rights to due process and a speedy trial.

In *Barker* v. *Wingo*, Docket No. 71-5255 (October Term, 1971), this Court granted certiorari on the presented question "Whether Petitioner is required to make a demand for trial and show he was prejudiced by the delay in order to preserve his right to a speedy trial under the Sixth Amendment?" It is respectfully submitted that the issues raised by this case would make it an essential companion to *Barker*, since, as they relate to the "demand" rule, intentional prosecutorial delay and the necessity for showing prejudice they would not only complement *Barker* but also include factors not directly raised by that case.

Certiorari in this case would also reach the issue left open in *United States* v. *Marion*, —— U. S. ——, 92 S. Ct. 455, 469 (1971), of drawing the line "so as not to condone illegitimate delays whether at the *pre-* or the *post-*indictment stage," 92 S. Ct. at 469 (concurring opinion of Mr. Justice Douglas).

The "demand" rule attacked by the petitioner in *Barker* which holds that a defendant waives his right to a speedy trial unless he has made a demand therefor* was appar-

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* Criticized in ABA Project on Minimum Standards of Justice, *Standards Relating to Speedy Trial*, §2.2.

ently first stated in the Second Circuit, *United States* v. *Lustman*, 258 F. 2d 475 (2d Cir. 1958), cert. den. 358 U. S. 880 (1958), and spread to other circuits, e.g. *Von Feldt* v. *United States*, 407 F. 2d 95 (8th Cir. 1969). A corollary of that rule, the "four factor test" of determining whether an indictment should be dismissed for delay claimed to be violative of Fifth or Sixth Amendment guarantees was stated by the Second Circuit in *United States ex. rel. Von Cseh* v. *Fay*, 313 F. 2d 620, 623 (2d Cir. 1963): "Four factors are relevant to a consideration of whether denial of a speedy trial assumes due process proportion: the length of delay, the reason for the delay, the prejudice to defendant and waiver by the defendant," where it has recently been reaffirmed. *United States ex. rel. Solomon* v. *Mancusi*, 412 F. 2d 88 (2d Cir. 1969), cert. den. 396 U. S. 936 (1969). Although the issue has been much canvassed by the Court of Appeals for the Second Circuit in many cases, the "demand" rule and the "four factor test" have always found the defendant wanting no matter what the delay, the cause or the attendant circumstances. See *United States* v. *Stein*, —— F. 2d —— New York Law Journal, 3/27/72, p. 1 (2d Cir. 2/25/72). It would certainly seem that in the Court of Appeals the current standards applied have resulted in a stifling rather than a protection of a defendant's right to a speedy and unimpeded determination of the charges.*

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* A few district court decisions have gone the other way. See *United States* v. *Dillon*, 183 F. Supp. 541, 542, 544 (SDNY 1960); *United States* v. *Mann*, 291 F. Supp. 268, 273 (SDNY 1968); *United States* v. *Perez*, 310 F. Supp. 550, 552 (SDNY 1970); *United States* v. *Chin*, 306 F. Supp. 397, 399 (SDNY 1969); *United States* v. *Roberts*, 293 F. Supp. 195, 198 (SDNY 1968); *United States* v. *Albert*, 320 F. Supp. 820, 823 (SDNY 1970).

Despite the fact that the two year delay complained of below resulted from the prosecution's deliberate choice not to seek an indictment from the 1968 grand jury when its case was complete and had been presented, which became known only at the trial, the government argued below that petitioner had waived the point because he failed to raise it pre-trial. Appellee's brief, p. 19. The Court of Appeals did not rest its decision on that ground but held that even deliberate delay did not warrant dismissal as long as the indictment was returned within the statutory period of limitations. Slip sheet op., p. 1563.

That holding is contrary to the rulings of this Court in *Pollard* v. *United States*, 352 U.S. 354, 361 (1957)—". . . The delay must not be purposeful or oppressive . . .", *Dickey* v. *Florida*, 398 U.S. 30, 51, 90 S.Ct. 1564, 1575-6 (1970), concurring opinion of Justice Brennan—"Clearly, a deliberate attempt by the government to use delay to harm the accused, or governmental delay that is 'purposeful or oppressive' is unjustifiable," and *United States* v. *Marion*, supra,—"it is appropriate to note here that the statute of limitations does not fully define the appellees' rights with respect to the events occuring prior to indictment. Thus, the Government concedes that the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellees' rights to a fair trial and that the delay was a purposeful device to gain tactical advantage over the accused," —— U.S. ——, 92 S.Ct. at 465. It would certainly seem appropriate for this Court to "draw the line" —— U.S. ——, 92 S.Ct. at 469, in this case in view of the Court of Appeals' contrary holding on the heels of *Marion*.

It would also seem imperative for this Court to make its statement effective by ordering dismissal of the indictment herein for no other action will prevent the government from conceding in this Court, for the sake of argument, that due process requires dismissal where pre-indictment delay is a deliberate prosecutorial device to gain tactical advantage over the defendant, *United States* v. *Marion*, —— U.S. at ——, 92 S.Ct. at 465, while at the same time arguing in the Court below that the statute of limitations was the sole protection (the court below so held) and that the onus was upon the defendant to somehow make a demand in the absence of which waiver was to be presumed.

Unlike *Marion*, where this Court found there was "no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them" —— U.S. at ——, 92 S.Ct. at 466, such a showing was made below. It was demonstrated below on the motion to dismiss, that, at and before the time this case was presented through direct witnesses to the 1968 Eastern District grand jury, the prosecutors then assigned and the Special Agent had conferred with the United States Attorney's office for the Southern District concerning *all* the prosecutions to be brought against Mr. Wenger (A. 603). Thereafter, a deliberate prosecutorial decision was reached, according to the representations made to the Court below (A. 365), not to seek an indictment from the 1968 Eastern District grand jury, when unencumbered by other charges and adverse publicity, Mr. Wenger could have sought a prompt trial before any of the Southern District matters, which, Judge Weinstein stated below, he would in fact have received (A. 370-1). The indictment herein was deliberately delayed until after a trial had been scheduled by Judge Tyler in the Southern District

on indictment 68 Cr. 467 which was followed quickly by another trial in the Southern District before Judge Pollack on indictment 69 Cr. 569 which took place immediately before the trial in this case, effectively preventing petitioner from securing a prompt, unharassed determination of these charges. The prejudice from the oppressive delaying tactics of the prosecution was considerably worsened by the return of four other indictments against the petitioner in the Southern District before the one in this case. 68 Cr. 434, 68 Cr. 477, 68 Cr. 614, 70 Cr. 213. If this case was not the weakest of the lot against petitioner, it certainly was the simplest for the prosecutor. The record permits no other inference than that the prosecution intended to, and did deliberately hamper and, indeed, prevent its defense. It is clear that the government regarded all charges against petitioner in both districts as a package to be manipulated to his disadvantage. Petitioner was arrested and constrained to answer on the part of the package the prosecution first chose to surface in the Southern District. The prosecution could not manipulate and delay the remaining portion in the Eastern District without running afoul of the Sixth Amendment. See *Smith* v. *Hooey*, 393 U.S. 374 (1969).

The Second Circuit's recently promulgated "Rules Regarding Prompt Disposition of Criminal Cases" and any other set of similar rules can easily be circumvented by the sort of prosecutorial device employed in this case. It also should not escape notice that the second count of the indictment herein alleged a conspiracy, a not infrequent charge, which would allow the prosecution a nearly untrammeled opportunity for delay merely by adding another overt act, were the type of manipulation used in this case allowed to go uncorrected. It can readily be seen that the type of prosecutorial delay employed in this case is a cause of court congestion.

**2. The protection the Constitution intended the grand jury to afford should be effectuated.**

In *Umans* v. *United States*, 389 U.S. 80 (1967), this Court dismissed as improvidently granted a writ of certiorari to review the question of whether prosecutorial reliance on hearsay testimony of investigating agents when direct testimony was available constituted an abuse of the grand jury process. This Court's action was taken after the United States Attorney for the Southern District of New York filed a statement in this Court representing that the practice had been abandoned. Similar representations have been made by the United States Attorneys for the Eastern District of New York, *United States* v. *Arcuri*, 405 F.2d 691, 693 (2d Cir. 1968), and the District of Connecticut, *United States* v. *Messina*, 388 F.2d 393, 394 n. 1 (2d Cir. 1968).

Yet within two years after these representations were made, this indictment was returned against petitioner solely upon the hearsay testimony of the investigating agent when direct witnesses were available.

Although the Second Circuit has in many cases criticized the subversion of the grand jury's screening function by the practice here employed it has never dismissed an indictment on that ground. Compare the majority opinion in *United States* v. *Beltram*, 388 F.2d 449, 451 (2d Cir. 1968) with the dissent, 388 F.2d at 452, 453. See also Chief Judge Friendly's dissent in *United States* v. *Payton*, 363 F.2d 996, 999-1000 (2d Cir. 1966). The Second Circuit is thus in conflict with the rule announced in *United States* v. *Gramolini*, 301 F. Supp. 39, 43 (D.R.I. 1969), that indictments would be dismissed which were returned through a subversion of the grand jury's function such as occurred below.

The rule prevailing in the Second Circuit and applied in this case effectively permits trial and conviction on charges which could not have been evaluated by the grand jury, a practice contrary to the decisions of this Court in *Ex Parte Bain,* 121 U.S. 1 (1887) and *Stirone* v. *United States,* 361 U.S. 212, 219 (1960) and cases there cited.

Moreover, the Second Circuit, while never stating what abuse of the grand jury process would require dismissal of an indictment, has placed an impossible burden on defendants before they are even entitled to have the issue considered. First stated in *United States* v. *Liebowitz,* 420 F.2d 39, 42 (2d Cir. 1969), and applied below, slip sheet op., p. 1563, the Second Circuit rule places the burden on the defendant to show that the grand jury was actually misled into believing it was getting eyewitness testimony (a showing impossible under present Rule 6 of the Federal Rules of Criminal Procedure) or that there was a high probability that the grand jury would not have indicted if it had heard direct testimony of actual witnesses (a convicted defendant, the only sort who could raise the issue on appeal, stands no chance of making such a demonstration and the Rule 6 problem still applies). To erect a standard which a defendant can never meet is to deny due process. See *Griffin* v. *Illinois,* 351 U.S. 12 (1956). The standard applied in this case is dangerously analogous to that regularly rejected under the Fourth Amendment, that the search (here the trial) is justified by what turns up. See *Johnson* v. *United States,* 333 U.S. 10, 16 (1948).

The concern expressed by this Court in *Costello* v. *United States,* 350 U.S. 359, 363 (1956), that allowing an attack on an indictment as based on hearsay would delay the trial through the necessity of pre-trial hearings has largely been eliminated by the application of the Jencks

Act, 18 U.S.C. §3500. Under that statute there will be produced at trial the grand jury minutes of the government agents and other witnesses through which abuses may be shown as they were below without any need for delay or a separate proceeding.

When the Constitution guarantees a right to all citizens, the courts are obliged to preserve that right rather than to place the burden on the defendant to show he is somehow worthy of it . See *Glasser* v. *United States*, 315 U.S. 60, 70-1 (1942) and *Spevack* v. *Klein*, 385 U.S. 511 (1967). This is particularly the case with such rights as having to answer in a criminal case on an indictment returned through proper grand jury proceedings, *Stirone* v. *United States*, supra, *Ex. Parte Bain, supra*, which are proceedings over which the defendant has no control and in which, usually, as here, is permitted no role.

### 3. Excluded hearsay testimony may not be used as a basis for conviction.

The decision below is a complete departure from the longstanding rule that a conviction can not be based on hearsay testimony, reflects a misunderstanding of this Court's recent decisions on the possible effect of a co-defendant's statements on jury deliberations and opens the door to broad use of hearsay testimony in criminal cases.

In *Bridges* v. *Wixon*, 326 U.S. 135, 153-4 (1945), this Court held:

> "The statements which O'Neil allegedly made were hearsay. We may assume they would be admissible for purposes of impeachment. But they certainly would not be admissible in any criminal case as substantive evidence . . . So to hold would allow men to be convicted on unsworn testimony of

> witnesses—a practice which runs counter to the notions of fairness on which our legal system is founded." 326 U.S. at 153-4, citations omitted.

In *Bruton* v. *United States*, 391 U.S. 123, 126 (1968), this Court held that an instruction by the trial court limiting the admissibility of a defendant's damaging out of court statement to the alleged declarant was insufficient protection for a co-defendant. Mr. Justice Stewart in his concurring opinion in *Bruton* stated:

> "certain kinds of hearsay . . . are at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence the minimal weight it logically deserves, *whatever* instructions the trial judge might give. See the Court's opinion, ante, at 136, n. 12. It is for this very reason that an out-of-court accusation is universally conceded to be constitutionally *inadmissible* against the accused, rather than admissible for the little it may be worth." (citations omitted). 391 U.S. at 138.

When Edward Handy testified below that Semel (a co-defendant at the time the testimony was given) had asked him to come to the closing on the loan half an hour early and, when Handy complied, that Semel told him the alleged finder's fee to Wenger was to be arranged by an antique sale to result in a capital gain rather than by check, the trial court gave the limiting instruction held insufficient by this Court in *Bruton* (A. 40-1). Nowhere else in the record was there any testimony concerning the substitution of a capital gain transaction for a cash fee, the crucial issue in the case. Concededly, petitioner was not present during the alleged conversation Edward Handy said he had with Semel. After the prosecution

had dismissed the charge against Semel as a prelude to calling him as its own witness, the trial court instructed the jury that nothing that Semel was alleged to have said outside of the presence of petitioner was any longer evidence in the case (A. 400-01). The prosecution asked no question of Semel on direct or re-direct about his alleged conversation with Edward Handy half an hour before the loan closing. Thus there was no evidence properly before the jury against anyone as to that conversation upon which petitioner's counsel could cross-examine Semel. Yet the Court below held: "The hearsay problems which arose during the course of the trial were cured when the out-of-court declarant [Semel] became a witness." (slip sheet op., pp. 1562-3).

It is respectfully submitted that ruling below has turned this Court's decision in *Nelson* v. *O'Neil,* 402 U.S. 622 (1971), on its head. In that case, this Court rejected the petitioner's argument that the rule of *Bruton* had been violated because the co-defendant, testifying as a defense witness had denied making an out-of-court statement, admitted solely as to him, and thus could not be cross-examined by the petitioner. The majority in *O'Neil* concluded that, as a practical matter, the co-defendant's denial was the most that the petitioner could have hoped to establish on cross-examination and placed a very limited gloss on the *Bruton* rule:

> "We conclude that where a co-defendant takes the stand in his own defense, denies making an alleged out of court statement implicating the defendant, and proceeds to testify favorably to the defendant concerning the underlying facts, the defendant has been denied no rights protected by the Sixth and Fourteenth Amendments." 402 U.S. at 629-30.

At the trial below, Semel was called as a prosecution witness, did not, as in *O'Neil*, testify to a joint alibi defense, and did not deny making the statement attributed to him by Handy (about which the prosecutor did not ask him, possibly because of the trial court's exclusionary ruling). Nonetheless, under the holding below, petitioner, himself would be forced to place before the jury the Handy hearsay, excluded by the trial court, in order to cross-examine the alleged declarant on pain of waiving his objection to the jury's use of the hearsay against him. Such a ruling is plainly contrary to *Bruton* for it would require a defendant to direct the jury's attention specifically to inadmissible hearsay which it should not consider.

In *Bruton, O'Neil* and *Schneble* v. *Florida*, —— U. S. ——, 10 Cr. L. 3106 (Docket No. 68-5009, 3/21/72), this Court dealt with situations where the hearsay statements attributed to a co-defendant remained in the record at least as to that defendant. At the trial below, the damaging hearsay was not properly before the jury as to any defendant.

It would seem appropriate to grant certiorari in this case not solely to correct an error of constitutional dimensions in this case but because of the likelihood of it arising in many other cases under the Second Circuit ruling below since the prosecution frequently dismisses the charges against one defendant in order to use him as a witness against one or more of the remaining defendants. This Court should make clear that under those circumstances prejudicial hearsay admitted solely against the dismissed defendant cannot be utilized by the jury if the remaining defendants do not bring it again to the attention of the jury.

As there was in this case, "a reasonable possibility that the improperly admitted evidence contributed to the con-

viction," *Schneble* v. *Florida*, —— U.S. at ——, 10 Cr.L. at 3107, since the jury asked to have the excluded hearsay reread (A. 571-2), reversal would seem to be required. As Mr. Justice Marshall stated in his dissent in *Schneble*, "We need ascribe no malevolence [to the jury] here; we need only recognize that humans err." —— U.S. at ——, 10 Cr.L. at 3109. The jury below could not follow the trial court's limiting instructions, justifying this Court's cautious approach in *Bruton*.

**4. Disclosure on petitioner's return of the sole transaction complained of precludes a conviction for attempted evasion.**

The essence of a tax evasion case is concealment. *Ingram* v. *United States*, 360 U.S. 672, 678-80 (1959); *Spies* v. *United States*, 317 U.S. 492, 499 (1943). This Court held in *Spies* that there was no criminal tax offense of any degree if disclosure was made, even though the government contended an additional tax was due. 317 U.S. at 498. This is so, because of the taxpayer's right to limit his "admission of liability" to the amount he believes he owes. 317 U.S. at 496. If a taxpayer were always required to report a transaction on his return in the manner which yielded the maximum possible tax, on pain of criminal prosecution, resort to the Tax Court or other civil courts would be rendered illusory. See, e.g. *United States* v. *Generes*, —— U.S. ——, 92 S.Ct. 827, 834-5 (1972).

The sole transaction complained of at the trial below, the purchase and sale of antiques, arranged by Semel, an attorney petitioner knew was versed in tax matters (A. 419, 427, 451, 457), was reported by petitioner on his 1963 tax return in a manner which immediately brought

it to the attention of the examining Revenue Agent (A. 296-7, 302). Contrast *Sansone* v. *United States*, 380 U.S. 343 (1965), where the false return omitted the transaction.

The upholding of the evasion conviction on such a plainly disclosed transaction below is in conflict with the decisions of other circuits. See *Davis* v. *C.I.R.*, 184 F.2d 86, 87 (10th Cir. 1950); *Webb* v. *C.I.R.*, 394 F.2d 366, 378-80 (5th Cir. 1968); *Rogers* v. *C.I.R.*, 111 F.2d 987, 989 (6th Cir. 1940); *Small* v. *United States*, 255 F.2d 604, 609 (1st Cir. 1958).

The decision below is also in conflict with decisions of the Tax Court which have refused to impose even a civil negligence penalty where timely returns disclosed the disputed item. *Joseph Czizler*, 12 TCM 386 (1953); *J.A. Seaman*, 24 TCM 78 (1965); *J. Imhoff*, 29 TCM 966 (1970); *Davis Regulator Co.*, 36 B.T.A. 437, 444 (1937)— disclosure of income but not as taxable; See also *A.M. Standish*, 4 T.C. 995, 1001 (1945), aff'd, 154 F.2d 1022 (9th Cir. 1946).

As construed below, 26 U.S.C. §7201, violation of which is a felony, becomes little more than a tax vagrancy statute increasing the federal police arsenal for discriminate conviction on grounds other than those which led to the apprehension of the defendant. See *Papachristou* v. *City of Jacksonville*, —— U.S. ——, 92 S.Ct. 839, 846-7 (1972). In this very case, the trial court at sentence expressed doubt that there would have been a criminal tax prosecution were it not for the other cases against petitioner involving other statutes in the Southern District of New York (A. 671).

## CONCLUSION

**For these various reasons, this petition for a Writ of Certiorari should be granted.**

Respectfully submitted,

LLOYD A. HALE
*Attorney for Petitioner.*

[APPENDICES FOLLOW]

# APPENDIX A

## Opinion of the United States Court of Appeals

UNITED STATE SCOURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 365—September Term, 1971

(Argued January 3, 1972 Decided January 26, 1972.)

Docket No. 71-1728

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UNITED STATES OF AMERICA,

*Appellee,*

—against—

DAVID H. WENGER,

*Appellant.*

---

Before:

FRIENDLY, *Chief Judge,*
MOORE and OAKES, *Circuit Judges.*

Appeal from a judgment convicting the appellant of having willfully attempted to evade part of his 1963 individual income tax in violation of 26 U.S.C. §7201, entered after a jury trial before Jack B. Weinstein, *Judge,* in the United States District Court for the Eastern District of New York.

Affirmed.

## *Appendix A*

LLOYD A. HALE, New York, N. Y., *for Appellant.*

RICHARD B. BUHRMAN, Attorney, Tax Division, Department of Justice, Washington, D. C. (Scott P. Crampton, Assistant Attorney General, Washington, D. C., Meyer Rothwacks, Crombie J. D. Garrett and John P. Burke, Attorneys, Tax Division, Department of Justice, Washington, D. C., Robert A. Morse, United States Attorney for the Eastern District of New York, Brooklyn, N. Y., of counsel), *for Appellee.*

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MOORE, *Circuit Judge*:

David H. Wenger appeals from his conviction of having wilfully attempted to evade part of his 1963 individual income tax in violation of 26 U.S.C. §7201. As we find appellant's numerous contentions advanced on this appeal without merit, the judgment of conviction is affirmed.

At trial, the central factual issue was whether appellant had fraudulently designed a transaction which would enable him to report part of his ordinary income as short-term capital gain. According to the Government, the benefit which accrued to appellant by means of such reporting was that certain income became non-taxable as short-term capital gain because it was offset by valid long-term capital losses. This treatment resulted in an understatement of taxable income and a reduction of tax liability of approximately $8,500. The evidence introduced at trial clearly established that the transaction which supposedly resulted in short-term capital gain was a transparent sham.

## *Appendix A*

The Government's claim that Wenger actually received ordinary income and not a short-term capital gain is based in substance on the following facts:

Wenger, a certified public accountant since 1937, was the accountant for the pension fund (the Fund) of Local 11, AFL-CIO, Chain Restaurant Service (the Union) and advised the Union with respect to loans made by the Fund. In the summer of 1963, Handy Associates, Inc. (Associates) needed to borrow money. Associates' counsel and Wenger arranged to have the Fund loan $150,000 to Associates, Wenger's finder's fee to be $15,000. Instead of being paid in cash or by check, which would have been ordinary income, a scheme (there was proof from which a jury could so find) was devised whereby Wenger would buy from Associates' President, John Handy, antiques for $5,000 and sell them shortly thereafter for $20,000, thus realizing a short-term capital gain of $15,000, namely, Wenger's finder's fee.

The methods used to accomplish this transaction need only be sketchily described. John Handy had purchased on May 27, 1963, certain antiques from an antique dealer, Frank Partridge, Inc. The antiques were delivered to John Handy's residence. On August 12, 1963, Wenger bought from John Handy for $5,000 specified items, one pair of commodes, one pair of Foochow dogs, Chinese porcelain, a pair of Kngsi vases, and a Chippendale table. Less than a month later John Handy instructed Frank Partridge, Inc., to repurchase these same antiques from Wenger for $20,000—a meteoric rise scarcely to be equalled on any stock exchange. The antiques which were the subject of this transaction had been selected

not by Wenger but by Edward Handy, son of John Handy. No physical delivery of the antiques was ever made by John Handy to Wenger nor by Wenger upon the resale to the Partridge firm. The Partridge firm issued its check for $20,000 to Wenger in payment for the antiques and Wenger deposited the check in his bank account. The Partridge firm immediately resold the antiques to Associates for $20,000, Partridge apparently handling the transaction as an accommodation to John Handy.

Wenger, who had long-term capital losses, then applied his short-term capital gain against these losses. Had Wenger reported his finder's fee as ordinary income, his taxable income would have been much larger. Thus arose the charge of wilful tax evasion.

From the evidence presented on the trial, the jury could easily have found established beyond a reasonable doubt all the elements necessary for conviction of the crime charged in count I of the indictment.

Count II charged Wenger and his co-defendant, counsel for Associates, with conspiring to attempt to evade Wenger's 1963 income tax. As to this count, the trial court granted defendants' motion for judgment of acquittal.

In addition to his argument as to failure of proof with respect to the essential elements of the crime charged in count I, Wenger urges that judgment of acquittal on count II required the same result with respect to count I; prejudice resulting from testimony admitted solely against the co-defendant; hearsay testimony before the Grand Jury; delay between investigation and indictment; an inflammatory summation by the prosecutor; and error in the

trial court's charge. A review of the trial transcript established that the conspiracy count was dismissed because the Judge thought there was insufficient evidence of an agreement between the two alleged co-conspirators (Tr. pp. 835-841). Thus, the dismissal of the conspiracy count did not preclude a conviction for the separate and distinct offense[1] of tax evasion.[2] The hearsay problems which arose during the course of the trial were cured when the out-of-court declarant became a witness.

The attack on the indictment as founded solely on hearsay is totally without merit. In addition to the Special Agent's testimony before the Grand Jury, the Grand Jury was permitted to examine ten material documents. These documents served to corroborate the Special Agent's testimony. Secondly, Wenger has failed to establish that:

> ". . . the grand jury . . . [was] misled into believing it . . . [was] getting eye-witness testimony from the agent . . . . [or that there was] a high probability that with eye-witness rather than hearsay testimony the grand jury would not have indicted."[3]

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[1] *Cf., Pereira* v. *United States*, 347 U.S 1 (1954); *Pinkerton* v. *United States*, 328 U.S. 640 (1946).

[2] Under the facts of this case we need not determine when the dismissal of one count of an indictment might require the dismissal of other counts at the same trial. Cf., *United States* v. *Coplon*, 185 F.2d 629, 633 (2d Cir. 1950), *cert. denied*, 342 U.S. 920 (1952); *United States* v. *Rainone*, 192 F.2d 860, 861 (2d Cir. 1951); *United States* v. *Marcone*, 275 F.2d 205, 206 (2d Cir.), *cert. denied*, 362 U.S. 963 (1960); *United States* v. *Carbone*, 378 F.2d 420 (2d Cir. 1967).

[3] *United States* v. *Leibowitz*, 420 F.2d 39, 42 (2d Cir. 1969); also quoted in *United States* v. *Rifkin*, —— F.2d—— (2d Cir. November 17, 1971), Slip Op. 581, 588.

Similarly unpersuasive is the contention that the "deliberate delay" in returning the indictment requires dismissal. The indictment was returned within the statute of limitations and no prejudice resulted from the pre-indictment delay. *United States* v. *Marion,* 40 U.S.L.W. 4092, 4096 (December 20, 1971).

The prosecutor's summation, while forceful, was not prejudicial, and the charge to the jury was proper under the facts of the case. No error is to be found in these points.

Affirmed.

# APPENDIX B

## Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of January one thousand nine hundred and seventy-two.

Present:

HON. HENRY J. FRIENDLY,
*Chief Judge*
HON. LEONARD P. MOORE,
HON. JAMES L. OAKES,
*Circuit Judges.*

---

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

*v.*

DAVID H. WENGER and MELVIN SEMEL,

Defendants.

DAVID H. WENGER,

Defendant-Appellant.

---

## *Appendix B*

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO
Clerk

# APPENDIX C

**Orders Denying Petition for Rehearing and Hearing En Banc**

71-1728

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

---

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

*v.*

DAVID H. WENGER and MELVIN SEMEL,

Defendants,

DAVID H. WENGER,

Defendant-Appellant.

---

A petition for a rehearing together with a motion in the alternative to stay the issuance of the mandate pending application for a writ of certiorari to the Supreme Court of the United States having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Mar. 10, 1972

HENRY J. FRIENDLY, USCJ

LEONARD P. MOORE, USCJ

JAMES L. OAKES, USCJ

*Appendix C*

71-1728

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

---

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

*v.*

DAVID H. WENGER and MELVIN SEMEL,

Defendants,

DAVID H. WENGER,

Defendant-Appellant.

---

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

HENRY J. FRIENDLY
Chief Judge

March 10, 1972

# APPENDIX D

## U. S. Constitution

### Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jodpardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

LIBRARY
SUPREME COURT, U. S.

No. 71-1295

FILED
JUN 1 1972
MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1971

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DAVID H. WENGER, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

ERWIN N. GRISWOLD,
*Solicitor General,*

SCOTT P. CRAMPTON,
*Assistant Attorney General,*

JOHN P. BURKE,
JAY G. PHILPOTT, JR.,
*Attorneys,*
*Department of Justice,*
*Washington, D. C. 20530.*

# In the Supreme Court of the United States

OCTOBER TERM, 1971

---

No. 71-1295

DAVID H. WENGER, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

### JURISDICTION

The judgment of the court of appeals affirming petitioner's conviction was entered on January 26, 1972 (Pet. App. B), and the petition for rehearing and rehearing en banc was denied on March 10, 1972 (Pet.

App. C). The petition for a writ of certiorari was filed on April 7, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether petitioner was denied his rights to due process and a speedy trial by delay in obtaining the indictment.

2. Whether the indictment is invalid because based in principal part on hearsay testimony of the investigating agent.

3. Whether petitioner was denied a fair trial by the admission of hearsay testimony which the jury was subsequently instructed to disregard.

4. Whether the evidence was sufficient to support petitioner's conviction.

## STATUTE INVOLVED

The Internal Revenue Code of 1954 (26 U.S.C.) provides:

> SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.
>
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall * * * be guilty of a felony * * *.

## STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner, a certified public accountant (R. 402),[1] was

[1] "R." refers to the appendix in the court of appeals.

convicted of having willfully attempted to evade part of his 1963 income tax in violation of 26 U.S.C. 7201. He was sentenced to three years' probation and fined $7500. His conviction was affirmed by the court of appeals (Pet. App. A, B). A petition for rehearing was denied without opinion (Pet. App. C).

Petitioner's indictment was returned by a grand jury for the Eastern District of New York on March 31, 1970 (R. 1). The transaction giving rise to this indictment had been the subject of a similar grand jury investigation in 1968, but the grand jury at that time had not been asked to indict petitioner on the instant charge because the Internal Revenue Service special agent's report had not then proceeded through normal administrative review procedures, including conferences with the taxpayer (R. 365, 635-637). Although several witnesses had testified before the grand jury in 1968 (R. 366), the evidence before the 1970 grand jury consisted of several documents (R. 627-628) and testimony by the Internal Revenue Service special agent.[2] At trial, petitioner was furnished with all pertinent 1968 and 1970 grand jury evidence (R. 610, 654-655).

The evidence at trial established that in 1963 petitioner assisted in the making of a loan of $125,000 to Handy Associates, Inc. by a union pension fund which he served as accountant (R. 50, 407). Petitioner told Melvin Semel, the attorney for Handy Associates, that his fee for arranging the loan would

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[2] Special Agent Silverman's testimony is found in the Joint Exhibit Appendix filed in the court of appeals, at 104a-130a.

be $15,000 and he requested Semel "to work out a tax avoidance plan, in an attempt to get a capital gain for the fee" (R. 410).[3]

Semel suggested to the corporation president, John Handy, an antique collector, that petitioner be allowed to purchase some of Handy's antiques at a discount and to realize a capital gain by reselling them at an appreciated price (R. 413, 418). Thereafter, petitioner paid $5,000 to Handy for certain antiques, which petitioner in turn 'sold' for $20,000 to an antique dealer who, by prior agreement with Handy, immediately 'resold' the antiques to Handy Associates (R. 56-63, 167-182). The antiques at all times remained in Handy's possession (R. 177-188). On his income tax return for 1963, petitioner reported a short-term capital gain of $15,000 on the sale of the antiques; this gain was completely offset by long-term losses so that no tax liability was reported on account of the transaction. Petitioner reported no finder's fee in connection with the loan to Handy Associates (R. 463).

During petitioner's trial, before the conspiracy count was dismissed as to Semel (see note 3, below), John Handy's son, Edward Handy, in testimony admitted only as to Semel, stated that Semel had informed him that petitioner's fee was to be paid not by check, as he had anticipated, but by the pur-

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[3] Semel was charged with conspiracy to evade tax as petitioner's co-defendant, but the government subsequently dismissed the conspiracy count as to Semel and called him as a prosecution witness (R. 400).

chase and resale of antiques (R. 39-41, 44). After the charge against Semel was dismissed the jury was instructed to disregard this testimony (R. 401). Thereafter, Semel himself testified that Edward Handy suggested several ways of arranging purchase and resale transactions so as to create a $15,000 gain (R. 572-573, 577-578, 580). During the jury's deliberations it requested to be read certain portions of Semel's testimony relating to Edward Handy, and the trial judge, with the agreement of petitioner's counsel, complied with the request (*ibid.*; R. 571).

## ARGUMENT

1. Petitioner contends (Pet. 10-14) that the delay prior to indictment violated his rights to due process and a speedy trial. However, this Court has recently ruled that the protections of the speedy-trial provision of the Sixth Amendment are engaged only by "either a formal indictment or information or else the actual restraints imposed by arrest" (*United States* v. *Marion*, 404 U.S. 307, 320), expressly stating that "we decline to extend the reach of the amendment to the period prior to arrest" (*id.* at 321). Since the record does not indicate, and petitioner does not contend, that he was arrested on the instant charge prior to indictment, petitioner has no basis for a Sixth Amendment claim here.

In *Marion*, the government did concede that the Fifth Amendment "would require dismissal of the indictment if it were shown at trial that the pre-indictment delay * * * caused substantial prejudice

to [a defendant's] rights to a fair trial and that delay was an intentional device to gain tactical advantage over the accused" (*id.* at 324). No such showing has been made here. Indictment was delayed to permit petitioner the benefit of administrative review procedures (R. 635-637) and not in order to obtain any unfair advantage. See *Donaldson* v. *United States*, 400 U.S. 517, 534-535. Furthermore, petitioner's assertion of prejudice (Pet. 5-6) is speculative and insubstantial. Cf. *United States* v. *Ewell*, 383 U.S. 116.

2. Petitioner contends (Pet. 15-17) that he was denied due process because his indictment was returned on the basis of hearsay testimony of Special Agent Silverman. The courts below correctly noted the additional fact that the basic documents evidencing the loan and antique transactions were before the grand jury (Pet. 5a; R. 367). Silverman's grand jury testimony (Joint Exhibit Appendix, 104a-130a) shows on its face that it was not given in such a manner as to mislead the grand jury into believing it was other than hearsay, and the court below (Pet. 5a) was satisfied that unlike *United States* v. *Leibowitz*, 420 F. 2d 39, 42 (C.A. 2), and *United States* v. *Rifkin*, 451 F. 2d 1149, 1154 (C.A. 2), the presentation of hearsay evidence to the grand jury in this case did not involve any risk of prejudice.

The petitioner was, of course, furnished the special agent's elaborate investigative report as well as the numerous prior statements of witnesses, thus eliminating any basis for concern in this case that abbreviated grand jury procedures may substantially reduce

a defendant's ability to probe the credibility of witnesses. Hearsay evidence which is fairly summarized is an adequate basis for an indictment. *Costello* v. *United States*, 350 U.S. 359, 362-364. This is particularly so where the summary is given by the investigating agent in a tax evasion case. *Jaben* v. *United States*, 381 U.S. 214, 224-225.

3. Petitioner contends (Pet. 17-21) that the admission of Edward Handy's testimony relating to Semel constituted reversible error. However, after dismissal of the charge against Semel the jury was repeatedly instructed to disregard this testimony, which had been admitted only as to Semel (R. 31, 34, 38, 40, 41, 401). Thus the trial court did not deviate from the rule urged by petitioner that "hearsay admitted solely against the dismissed defendant cannot be utilized by the jury if the remaining defendants do not bring it again to the attention of the jury" (Pet. 20).[4] Furthermore, as the court of appeals noted (Pet. 5a), the confrontation right protected in *Bruton* v. *United States*, 391 U.S. 123, was here preserved by Semel's subsequent appearance as a witness.[5]

4. Petitioner's contention (Pet. 21-22) that he was innocent of concealment, and therefore of any wilful attempt to evade taxes, is insubstantial. His mis-

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[4] Petitioner's assertion (Pet. 21) that the jury requested a rereading of the excluded hearsay is plainly false. The request pertained to Semel's testimony and was so understood by the trial court and petitioner's counsel (R. 571-573).

[5] There was, moreover, ample nonhearsay evidence tending to establish petitioner's intention to represent his fee income as a capital gain (R. 408, 410, 414-418).

representation that he received a capital gain when he actually received fully taxable earned income was not uncovered until it became the subject of an elaborate investigation in 1966, when Special Agent Silverman was assigned to investigate petitioner's relations to union pension funds (R. 602-603). Attempts to evade tax by falsely claiming capital gains or losses are not uncommon. See *United States* v. *Bursten*, 453 F. 2d 605, 609 (C.A. 5). Sophisticated taxpayers, including certified public accountants such as petitioner, should be held accountable for sophisticated attempts to evade taxes.

## CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted.

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MAY 1972.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

**No. 71-1295**

DAVID H. WENGER,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITIONER'S REPLY

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IN THE

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DAVID H. WENGER,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITIONER'S REPLY

Petitioner, David H. Wenger, respectfully submits this reply to the brief in opposition, filed herein by respondent on or about June 2, 1972, in order to correct several serious errors of fact, law, and procedure made in that brief.

Petitioner does not accept the paraphrase of the questions presented on page 2 of the brief in opposition* and adheres to the statement of the questions presented on

* Hereinafter cited "b.i.o.".

page 2 of the petition which was filed on or about April 7, 1972.

Necessary corrections of respondent's statement of the case will be made within each point to which they relate.

The numbered sections in this reply correspond to the reasons for granting the writ set forth in the original petition as well as to the headings in the petition's statement of the case and the questions presented.

Since the filing of the petition, the decision of the Court of Appeals for the Second Circuit, reprinted as Appendix A to the petition, has appeared officially in the advance sheets of the Federal Reporter, Second Series, 455 F. 2d No. 2, dated April 24, 1972. *United States* v. *Wenger,* 455 F. 2d 308 (2d Cir. 1972).

**1. Deliberate prosecutorial delay**

Respondent argues from foreshortened quotations of this Court's recent opinion in *United States* v. *Marion,* 404 U. S. 307, 92 S. Ct. 455 (1971) that this Court has already ruled that the protection of the Sixth Amendment's speedy trial provision is not available to petitioner, since he was not arrested or indicted *in this particular case* as the two years of deliberate prosecutorial delay in returning the indictment after the first grand jury presentation occurred before those events (b.i.o., p. 5). However, in the sentence just prior to that quoted by respondent, Mr. Justice White in his majority opinion wrote:

> "Invocation of the speedy-trial provision thus need not await indictment, information or other formal charge.[12]" 404 U. S. at 321, 92 S. Ct. at 463.

Footnote 12 of this Court's opinion in *Marion* reads:

> "In its Standards Relating to Speedy Trial, n. 10 supra, at 6, the ABA defined the time at which the beginning of the delay period should be computed as:
>
> '. . . the date the charge is filed, except that if the defendant has been continuously held in custody or on bail or recognizance until that date to answer for the same crime or *a crime based on the same conduct* or arising from the same criminal episode, then the time for trial should commence running from the date he was held to answer.' Rule 2.2.
>
> Under the ABA Standards, after a defendant is charged, it is contemplated that his right to a speedy trial would be measured by a statutory time period excluding necessary and other justifiable delays; there is no necessity to allege or show prejudice to the defense. Rule 2.1, *ibid.*" 404 U. S. at 321 n. 12, 92 S. Ct. at 463 n. 12. (emphasis added)

The prosecution of petitioner was in exactly that posture as will appear more fully, infra. Significantly, respondent does not deny that the tax evasion indictment in the Eastern District of New York and the six subsequent indictments in the Southern District were allegedly on the same conduct and were being treated by all law enforcement agencies involved as unitary (petition, pp. 3-5, 14). Nor can it be denied that petitioner was arrested and held to answer, in 1968, on a Southern District portion of that alleged conduct contemporaneously with the prosecution's presentation to the Eastern District grand jury (petition, p. 14). After a deliberate two year delay of the return of the grand jury indictment, which respond-

ent admits (b.i.o., p. 6), petitioner found himself in exactly the position which this Court in *Marion* found the Sixth Amendment forbade:

> "But the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy and create anxiety in him, his family and his friends." 404 U. S. at 320, 92 S. Ct. at 463.

Acknowledging that the two year delay in returning the indictment below was deliberate, respondent attempts to explain it away: "Indictment was delayed to permit petitioner the benefit of administrative review procedures (R. 635-637) and not in order to obtain any unfair advantage." (b.i.o., p. 6). That assertion will not bear analysis.

Presentation of a criminal tax case, as any other criminal case, to a grand jury is the end of the administrative review not the beginning of it. As this Court held in *DiBella* v. *United States*, 369 U. S. 121, 131, 82 S. Ct. 654, 660 (1962):

> "Presentations before a United States Commissioner, Go-Bart Importing Co. v. United States, 282 U. S. 344, 352-354, 51 S. Ct. 153, 156-157, 75 L. Ed. 374, as well as before a grand jury, Cobbledick v. United States, 309 U. S. 323, 327, 60 S. Ct. 540, 542, 84 L. Ed. 783, are parts of the federal prosecutorial system leading to a criminal trial." 369 U. S. at 131, 82 S. Ct. at 660.

The administrative steps for criminal tax cases reviewed by this Court in *Donaldson* v. *United States*, 400 U. S. 517, 534-5, 91 S. Ct. 534, 544 (1971) (b.i.o., p. 6) all take place even prior to referral of the case to the United States Attorney's office let alone presentation to a grand jury.

Treasury Regulations, §601.107(c)(2) provides:

> "(2) The Assistant Regional Commissioner (Intelligence) shall ordinarily notify the subject of an investigation and his authorized representative, if any, when he forwards a case to the Regional Counsel with a recommendation for prosecution. *This rule will not apply if the case is with a U. S. Attorney.*" (emphasis added)

That this case was already "with a U. S. Attorney" when it was presented to the 1968 grand jury is obvious. It is also borne out by the statement of the Special U. S. Attorney to the second grand jury, March 31, 1970, "Q. This case was originally in the organized crime office here and transferred to me in Washington, was it not? A. Yes, sir. Mr. Molenof: No further questions. Thank you." (Jt. Ex. App. A 130a). Mr. Molenof's statement that this case originated in the organized crime* office in the Eastern District of New York ("here") is especially

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* As applied in this case, "organized crime" is a term of art. Petitioner is not a racketeer or other participant in what is commonly referred to as organized crime. The Internal Revenue Manual includes as a part of their "Organized Crime Drive", labor-management cases or cases involving key individuals in pension or welfare trust fund fields. I.R.M. §§4565.1, 4565.2. In such cases the normal avenues of review are closed and the agents are instructed not even to seek a protective waiver of the statute of limitations on *civil* assessments.

pertinent. Indeed the very record references cited by respondent (b.i.o., p. 6) contain an admission by the prosecutor that this case was under the supervision of the Organized Crime and Racketeering Section of the Department of Justice (A 637) (also referred to as "Strike Force" cases) as were the cases against petitioner in the Southern District. In such cases, the policy is *not* to "permit . . . the benefit of administrative review procedures." (b.i.o., pp. 3, 6)*

It is clear that this case originated with the Strike Force in the United States Attorney's office in the Eastern District of New York which presented it to the grand jury in 1968. In another case, which is being handled by the same "Strike Force" in the same district, *United States* v. *Goldstein, supra*, a memorandum was submitted to the Court clearly stating what the government's policy and practice is when the Strike Force presents a case to a grand jury as it did against petitioner in 1968:

> "Thus, in recommending a Grand Jury probe the Special Agent was acting pursuant to long standing Bureau policy. On following such policy there is no provision either in law, regulations or policy that the subject of a Grand Jury probe be given a conference. In fact to offer such a conference would greatly infringe the broad investigative powers of

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* In *United States* v. *Goldstein*, —— F. Supp. —— (EDNY 72 Cr. 18, 5/5/72), p. 19, Judge Judd noted whose "benefit" such conferences when afforded are for: "It is true that a certain number of cases are dropped after each level of administrative conference, but the conferences are primarily for the benefit of the United States, to avoid the expenditure of effort on unfounded prosecution, and not for the benefit of defendants." (Contrast b.i.o., p. 3) Naturally such a determination is made before grand jury submission.

a lawfully constituted Grand Jury." Government's Answer to Defendant Goldstein's Motion to Dismiss The Indictment, p. 4 (72 Cr. 18, EDNY).

"The prosecutor's office is an entity and as such it is the spokesman for the Government." *United States* v. *Giglio*, —— U. S. ——, 92 S. Ct. 763, 766 (1972).

What is clear from the record is that petitioner was not informed at the time he was contacted in 1968 that the case against him had already been presented to the grand jury (b.i.o., pp. 3, 6; A 36).* This is strongly suggestive of the type of practice condemned by this Court in *Massiah* v. *United States*, 377 U. S. 201, 204, 206, 84 S. Ct. 1199, 1202-03 (1964). The only steps that the prosecution below claimed were taken after presentation to the 1968 grand jury were completed in 1968. No showing has been made of any reason why indictment was not then sought from the 1968 grand jury which had already heard live witnesses instead of waiting two years to beguile another grand jury with agent's hearsay except as "an intentional device to gain tactical advantage over the accused." *United States* v. *Marion*, 404 U. S. at 324, 92 S. Ct. at 465. Respondent concedes, *sub silentio*, that the case against petitioner was complete at the time of the 1968 grand jury presentation and that no investigation was carried out thereafter (petition, pp. 4, 12, 13).

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* There was no need to speak with petitioner at this late date. The special agent and revenue agent had commenced their investigation in 1966 by contacting petitioner and obtaining from him all records concerning not only the later questioned transaction but all transactions (A 282-4, 294-5) Revenue Agent Heller, in fact, admitted that it was "possible" at the first meeting with him that petitioner had insisted on an immediate audit of his 1963 return (A 295).

Respondent's citation of *United States* v. *Ewell*, 383 U. S. 116, 86 S. Ct. 773 (1966) (b.i.o., p. 6) is peculiarly inapposite. In *Ewell*, Justice White, speaking for the majority, found the claim of "possible prejudice . . . speculative and premature" 383 U. S. at 122, 86 S. Ct. at 777, since the defendants had not yet been tried on the second indictment. 383 U. S. at 123, 86 S. Ct. at 778. Here the demonstration of prejudice, procedural, situational and evidential, has been made, at trial and after conviction (petition, pp. 4-6, 13-14). Justice Brennan concurred specially in *Ewell* since the government had agreed to abandon the advantage of its oppressive conduct in returning 3 counts to supersede the one dismissed. 383 U. S. at 125, 86 S. Ct. at 779. The deliberate and oppressive conduct practiced against petitioner through delay and a multiplicity of manipulated indictments has been exploited fully.

Respondent apparently overlooks that portion of Justice White's opinion in *Marion*, "the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense." 404 U. S. at 320, 92 S. Ct. at 463.

**2. Subversion of the grand jury**

The point is not only that hearsay was used before the grand jury, as respondent would have it (b.i.o., pp. 6-7), serious though that problem is, but the continuation of a practice in securing indictments by deliberately withholding direct witnesses from the grand jury in favor of a hearsay presentation, a practice which the United States Attorneys' Offices in the Second Circuit have admitted is unfair by their repeated representations that they have abandoned it (petition, p. 15).

What renders the incursion on petitioner's right to have his case fairly considered by the grand jury before being held to answer particularly grievous, is that the prosecution did present its completed case to the 1968 grand jury through direct witnesses but deliberately withdrew the case from that grand jury in favor of the perfunctory procedure in 1970 following a two year delay (b.i.o., p. 6).

Not only was this oppressive procedure concealed from petitioner until it inadvertently came out at the trial, it was also concealed from the indicting grand jury in 1970 after concern had been expressed by a grand juror about the staleness of the case. The transcript of the March 31, 1970 grand jury proceedings show:

> "Mr. Molenof: Any questions.
>
> Juror: When did you start this investigation?
>
> The Witness: The case was assigned to me June 3, 1966.
>
> Juror: Five years ago?
>
> The Witness: About four years ago. A little under four years.
>
> Q. Is it unusual for long investigations in these cases? A. Usually investigations are completed within a period of two to three years depending on the intricacies involved.
>
> Q. This case was originally in the organized crime office here and transferred to me in Washington, was it not? A. Yes, sir.
>
> Mr. Molenof: No further questions. Thank you." (Jt. Ex. App., A 129a-30a)

The response of the prosecutor and the Special Agent to the grand jury inquiry was quite misleading. When a

jury wishes to investigate the staleness of a claim or the reasons for prosecutorial delay which may prove oppressive, its attempt to do so should not be subverted. The grand jury is an independent instrument of law enforcement and its interest in prompt law enforcement is as important as it is to the courts, the defendants and the public at large. It should not be thwarted. Nor should its plenary powers of investigation be curtailed by the unnecessary submission to it of a case on the eve of the expiration of the statute of limitations so that it cannot seek direct evidence.

Had the 1970 grand jury been told that there was a prior grand jury investigation in 1968 but no indictment was sought, as is now represented, the grand jury may well have made further inquiry. Had the 1970 grand jury been informed that earlier grand jury had heard direct witnesses, it may very well have directed that those witnesses be called so that it could evaluate their testimony as to events then seven years in the past. Had the prosecution called direct witnesses before the 1970 grand jury it would very likely have been revealed that those witnesses had previously appeared in 1968 and thus allowed the grand jury to make further inquiry into the delay and its effect on the case and, possibly, upon the defendant. For the prosecution to foreclose this by giving the less than frank representation that all that had happened after the investigation was completed was that the case which had originated in the Eastern District of New York had been transferred to Washington (Jt. Ex. App. A 130a) was to deny petitioner the right not to respond to charges unless they were returned by an unfettered grand jury. See *Russell* v. *United States*, 369 U. S. 749, 770-1, 82 S. Ct. 1038, 1050-1 (1962).

### 3. The Hearsay Tainted Verdict

Respondent does not argue that the trial court's instructions to the jury that the highly damaging hearsay testimony as to statements made by then co-defendant Semel out of petitioner's presence were admissible only as to Semel were sufficient or anything other than error under *Bruton* v. *United States*, 391 U. S. 123, 126, 138, 88 S. Ct. 1620, 1622, 1625 (1968). Indeed, it is difficult to see what if any justification respondent advances for the rulings below.

The "confrontation right" was not preserved (b.i.o., p. 7) since for the purposes of this case Semel was not the declarant whom Edward Handy described. His testimony as a prosecution witness in no way touched upon the supposed conversations with Edward Handy in Semel's office on September 6, 1963 and, indeed, did not even touch upon the events of that day. To say that a defendant's right of confrontation is preserved by forcing him to reintroduce hearsay, excluded from the case entirely at that point, simply in order to cross examine an alleged declarant is, as a practical matter, to make hearsay available to the jury in every case no matter what instructions the trial court gives, a result directly contrary to *Bruton*, 391 U. S. at 138, 88 S. Ct. at 1629.

Respondent seems to feel it is significant that the jury's request in its second day of deliberations for a rereading of Handy's hearsay described that testimony as *Semel's* (b.i.o., p. 7, n. 4). We agree but for different reasons. The jury's description of the Handy hearsay—and the request was inescapably for that because he was the only witness at the trial who testified that he had been asked to come earlier than the others to Semel's office (Compare A 571 with A 39-40)—as being Semel's

*own* testimony and not Handy's excluded hearsay, conclusively demonstrates that the jury was not able to perform the mental gymnastic indulged in by the Court and counsel of distinguishing between an out of court accusation and direct testimony as this Court feared in *Bruton*.*

**4. Disclosure, the Antithesis of Concealment**

The sole case cited by respondent as a justification for this unprecedented single year tax evasion prosecution based solely on an item disclosed on the return is *United States* v. *Bursten*, 453 F. 2d 605 (5th Cir. 1971) (b.i.o., p. 8). In that case, (the facts appear at 395 F. 2d 976, 979 (5th Cir. 1968)), the defendant claimed a *loss* carryover of $140,000 which he admitted was false and which the prosecution claimed was used to conceal a transaction wholly omitted from the return. To that extent, it was, like *Sansone* v. *United States*, 380 U. S. 343, 344, 85 S. Ct. 1004, 1006 (1965), a case where the taxpayer left the crucial transaction off the return in question thus effectively concealing it from the Internal Revenue Service.

In this case, petitioner disclosed the transaction on his return and did so in such a manner, the examining Rev-

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* The prejudicial nature of the Handy testimony, presumed under the *Bruton* rule, is manifest on this record. In that testimony and that testimony alone, the jury was told that Semel asked Handy to come early to the closing on the loan, the alleged finder's fee for which Handy allegedly had in his pocket in the form of a check to Wenger. When Handy complied, Semel allegedly told him that the check was not acceptable and instead the finder's fee was to be paid in the form of a sale of antiques at a price reduced by the amount of the finder's fee (A 40-1, 43-4). The jury was instructed by the court to close its ears to this testimony. That it could not, is shown by its request shortly before verdict to have *Semel's* testimony (there was none) as to these events reread.

enue Agent himself testified, as was sufficient to make it stand out from all the other capital gain transactions reported on petitioner's return and put the agent on notice to make further inquiry (A 296-7, 302). Nothing further is required of any taxpayer. *Spies* v. *United States*, 317 U. S. 492, 496, 498, 63 S. Ct. 364, 367-8 (1943). The most that the prosecution could complain of below was that the single questioned transaction should have been reported on one page rather than another of the return or described as "ordinary" ordinary income rather than as a *short-term* capital gain (which is also treated as ordinary income). This is the stuff that notices of deficiency and Tax Court cases are made of.

Petitioner neither expects nor seeks a review of the facts of this case. However, respondent's failure to mention certain salient facts, elicited from the government's own witnesses at trial reveals that what the prosecution has all along done in this case is to substitute adverbs for substantive proof.*

Petitioner was introduced to the president of the many Handy corporations, John Handy, by Semel, the attorney and tax adviser to Handy and his corporation as a prospective outside accountant (A 90-1, 403-4). Handy and his corporations were in the business of executive recruitment, which involved, inter alia, persuading persons to undertake new employment relationships by devising plans, with the aid of Semel, to give those persons substantial capital gains (A 30, 65-7, 72-4, 76-8, 403, 426; Ex. A). It was not contended that anything was wrong with this "tax avoidance" aspect of their business except

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* E.g.: "Attempts to evade tax by *falsely* claiming capital gains or losses are not uncommon." (b.i.o., p. 8, emphasis added, citing a single inapposite case).

insofar as it involved petitioner and then only as to him (A 76-8, 426-8). On his own personal tax return, reviewed by his attorney Semel, John Handy deducted his end of the very same antique transaction with petitioner as a capital loss on his return,* unquestioned by I.R.S. even though it was admittedly overstated (A 263-4, 332-3, 470-1, 479-81, 488-9). Petitioner on the other hand, the subject of an intensive "Strike Force" investigation, was not permitted to rely on Semel's advice as to the capital gain nature of this transaction even though Semel was known to petitioner as a tax-expert not only in his relationship with Handy and his corporations but also because Semel had in prior years issued tax opinions to clients of petitioner (A 426-7).

Contrary to the implication of page 8 of the brief in opposition, no "elaborate investigation" by the agents was necessary into this single transaction, since petitioner gave them all the documents and requested an immediate commencement of an audit (A 282-4, 294-5), unless under the rubric of "elaborate investigation" is meant the following:

(1) John Handy's return was accepted as filed (A 479-82);

(2) The Handy income tax liability, delinquent for a decade in many thousands of dollars, was closed out with a credit after the Special Agent had recommended criminal prosecution against petitioner and Edward Handy had testified before the 1968 grand jury in this case (A 134, 373, 383, 392-3, 602; Ex. FF).

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* Admittedly petitioner had nothing to do with the Handy return or, indeed, with the books and records of Handy or his corporations (A 222, 224-6, 264, 315-16).

(3) The concealment of corporate assets, the corporate discharge of John Handy's personal debts, the personal use of corporate assets (whose greatly increased market value was undisclosed) by John Handy, at a time when he and his corporations were grossly delinquent in taxes warranted a criminal investigation which was not made (A 384-5).

(4) If the same standards were applied to John Handy as are applied to other taxpayers by I.R.S., his *tax,* just on his 1963 return, was understated not less than $17-18,000. as against a reported *taxable income* of $1,097.53 (A 490-91, 493). No known action was taken against him.

What respondent evidently seeks in this case, is that this Court by its silence, at least, will allow unfettered discretion, in such cases as *ad hoc* prosecutorial groups may choose, to convert the rule of law into a rule of rhetoric. See *United States* v. *L. Cohen Grocery Co.,* 255 U. S. 81, 91, 41 S. Ct. 298, 300-01 (1921). It is respectfully submitted that should not be allowed.

## CONCLUSION

**The writ should be granted.**

Respectfully submitted,

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FILED
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MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

**No. 71-1295**

DAVID H. WENGER,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## PETITION FOR REHEARING

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## PETITION FOR REHEARING

Petitioner, David H. Wenger, by counsel, hereby petitions this Honorable Court, pursuant to Rule 58(2) of the Rules of this Court, for a rehearing on his petition for a writ of certiorari, which was denied on June 19, 1972, —— U. S. ——, 11 Cr. L. 4072.

Shortly after denial of certiorari herein, this Court delivered its opinion in *Barker* v. *Wingo*, 407 U. S. ——,

11 Cr. L. 3174 (No. 71-5255 6/22/72). It is respectfully submitted that the procedure and standards for determination of speedy trial claims set forth in *Barker* and this Court's subsequent vacation of the judgments, on June 26, 1972, in four other cases,* discussed *infra*, for reconsideration by the Second Circuit and the Kentucky Court of Appeals in the light of *Barker*, indicate that reconsideration of the petition herein is warranted and upon such reconsideration vacation of the judgment herein is also warranted for the same reasons that it was in the other cases.

In rejecting the demand-waiver rule as a threshhold requirement for the assertion of a violation of speedy trial rights, this Court, in *Barker*, held:

> "the rule we announce today, which comports with constitutional principles, places the primary burden on the courts and the prosecutors to assure that cases are brought to trial." 407 U. S. at ——, 11 Cr. L. at 3178.

The record in this case shows that the trial court was conscious of—and prepared to assume effectively—that burden in this case but was prevented from doing so by the deliberate two year prosecutorial delay in returning the indictment when the case against petitioner was admittedly complete. In language directly pertinent to the present case *Barker* holds:

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* *Saglimbene* v. *United States*, —— U. S. ——, 11 Cr. L. 4083 (No. 71-847 6/26/72); *Campopiano* v. *United States*, —— U. S. ——, 11 Cr. L. 4083 (71-1028 6/26/72); *Fasnaro* v. *United States*, —— U. S. ——, 11 Cr. L. 4083 (71-6337 6/26/72); *Kelley* v. *Kentucky*, —— U. S. ——, 11 Cr. L. 4083 (71-6196 6/26/72).

> "A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government." 407 U. S. at ——, 11 Cr. L. at 3179.

Because "[t]he Second Circuit's approach is unclear", *Barker* v. *Wingo*, 407 U. S. at —— n. 23, 11 Cr. L. 3177 n. 23, petitioner's claim that he was denied a speedy trial has not received consideration by the Courts below under the standards which *Barker* holds should be applied. Where such consideration has not been given, this Court's orders of June 26, 1972 in the cases cited *supra*, indicate that vacation of the judgment to allow reconsideration is appropriate. It is respectfully submitted that an analysis of those cases shows that a similar result should follow in this case.

In *Saglimbene* v. *United States*, —— U. S. —— (No. 71-847), complaint was made that the government had delayed the trial to gain a tactical advantage over the accused by trying the co-defendant (a fugitive) first. The Second Circuit affirmed the narcotics conviction without opinion (*Saglimbene* petition, App. A).

In *Campopiano* v. *United States*, —— U. S. —— (No. 71-1028), as in this case, the delay complained of was the two years preceding indictment. In a *per curiam* opinion, the Second Circuit summarily dismissed the speedy trial point (*Campopiano* petition, App. A) just as it did in this case (455 F. 2d at 310-11).

In *Fasnaro* v. *United States*, —— U. S. —— (No. 71-6337), as in the present case, the petitioner had been indicted in the Southern as well as the Eastern Districts of New York (*Fasnaro* petition, p. 10) and the government elected to try him in one district and put off trial

in the other district. Apparently the Second Circuit affirmed the delayed hijacking conviction without opinion (*Fasnaro* petition, p. 1).

In *Kelley* v. *Commonwealth of Kentucky*, —— U. S. —— (No. 71-6196), the Kentucky Court of Appeals summarily denied the speedy trial claim on a mechanical application of the demand-waiver rule (474 S. W. 2d at 64) just as the Second Circuit in this case held,—erroneously,—that petitioner had no complaint as long as the indictment was returned within the period prescribed by the statute of limitations (455 F. 2d at 311).*

Petitioner here also has not received consideration of his claim of denial of a speedy trial and due process under appropriate standards. In the first instance, the prosecution itself, by misrepresenting the delay issue before the indicting grand jury prevented the grand jury from determining the effect of the delay (petitioner's reply, pp. 9-10).** When these issues were raised before the trial court, that court felt bound to deny relief on the basis of the then precedents in the Second Circuit

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* Citing *United States* v. *Marion*, 404 U. S. 307 (1971). What this Court actually said in *Marion* was: "Thus, the Government concedes that the Due Process Clause of the Fifth Amendment would require dismissal of the indictment, if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellees' rights to a fair trial and that the delay was a purposeful device to gain tactical advantage over the accused." 404 U. S. at 324, 92 S. Ct. at 465.

** Since certiorari was denied herein on June 19, 1972, this Court may not have had sufficient time to consider petitioner's reply which was filed on June 13, 1972. As the reply supplements the petition and refutes the brief in opposition, reconsideration of the reply is respectfully suggested on rehearing.

found "unclear" by this Court in *Barker* and which *Barker* rejects to the extent they constitute a rigid application of the demand-waiver rule or any of the other four factors to be weighed. 407 U. S. at ——; 11 Cr. L. at 3177, 3179-80.* As already noted, the Second Circuit rejected the claim without discussion of any of the factors concerning the admitted two year prosecutorial delay during a crucial period but relied on the fact that the indictment was returned (just) within the statute of limitations.** 455 F. 2d at 311.

The only speedy trial case, other than those just discussed, decided by this Court after *Barker, Stein* v. *United States,* certiorari to the Second Circuit denied, June 26, 1972, —— U. S. ——, 11 Cr. L. 4076 (No. 71-1214), would also seem to indicate that vacation of the judgment herein to permit reconsideration of the issue is appropriate. In *Stein* a substantial issue of delay and attendant prejudice was raised. However, the Second Circuit panel in *Stein* carefully analyzed the factors involved (in an opinion covering 11 closely printed pages of the petition, *Stein* petition, App. A, pp. 14-24) according to standards not appreciably different from those later enunciated in

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* On denial of the motion to dismiss the indictment, without opinion, the trial judge stated, "there is nothing I can really add to the Second Circuit opinions that is going to be of any help to them . . ." (A. 668).

** Reliance on the statute of limitations alone is not a determination of a speedy trial claim. If an indictment is returned beyond the period limited, the prosecution is barred without regard to any of the factors which this Court held in *Marion* and *Barker* should be considered where the delay in prosecution is not specifically dealt with by statute or rule.

*Barker** and in terms quite distinguishable from the present case (e.g.s.: in *Stein,* the delay was not purposeful (456 F. 2d at 848), here it was admittedly so; in *Stein* there had been a rapid increase in case load per judge in the Southern District of New York (Ibid.), whereas below the trial court stated that, had the indictment against petitioner been returned in 1968 when the completed case was first presented to a grand jury, a trial would have been had in 1968 (A. 370-1)). Thus in *Stein,* where the claim was sensitively evaluated according to standards which this Court has announced, the petition was denied. In *Saglimbene, Campopiano, Kelley* and *Fasanaro,* where the claim of delay was not evaluated or treated under unstated or incorrect standards, the judgments were vacated to permit reconsideration by the lower courts under the *Barker* standards. As petitioner's case would fall in the latter group of cases but for the accident of time of decision it is respectfully submitted that the situation be rectified through a similar result in this case on this petition for rehearing.

Of particular pertinence is the intervening *Campopiano* decision for there, as here, the delay complained of was the two years preceding indictment. There, as in this case, the Solicitor's brief in opposition argued that *Marion* foreclosed any claim of a speedy trial violation (*Campopiano* brief in opposition, pp. 4-5; brief in opposition herein, p. 5). The court below made the same interpretation of *Marion* in this case. 455 F. 2d at 311. The vacation of the judgment in *Campopiano* as well as the careful discussion of the standards to be applied in *Barker* show this holding to be erroneous.

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* E.g.: the right to a speedy trial is relative (*Barker,* 407 U. S. at ——, 11 Cr. L. at 3176; *United States* v. *Stein,* 456 F. 2d at 847) and the four factor analysis (*Barker,* 407 U. S. at ——, 11 Cr. L. at 3179; *Stein,* 456 F. 2d at 847-8).

Since the deliberate prosecutorial delay is conceded, the two year delay was for the purpose of returning and trying other later cases to petitioner's disadvantage (See *Saglimbene, supra*), petitioner could have made no demand since the dual grand jury presentation was concealed from him until inadvertently revealed during the trial itself, and there was not insubstantial prejudice to his case (petition, pp. 4-6), if there is such showing required where the delay was prosecution motivated as here, this case meets the tests of *Barker* 407 U. S. at ——, 11 Cr. L. at 3179. Unless the judgment below is vacated and the case remanded for reconsideration under *Barker,* petitioner will be foreclosed from having his substantial claim of deliberate violation of Fifth and Sixth Amendment rights, which he has assiduously asserted once he discovered the violation, considered by *any* court under appropriate standards.

## CONCLUSION

**For the foregoing reasons and those previously advanced, it is respectfully submitted that rehearing be granted and upon such grant, the original petition be granted and the judgment below vacated.**

Respectfully submitted,

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**Certificate of Counsel**

I, attorney for petitioner, hereby certify that this petition for rehearing is presented in good faith, on the grounds stated herein, pursuant to Rule 58(2) of the Rules of this Court, and not for delay.

/s/ LLOYD A. HALE,
*Attorney for Petitioner.*